

Exhibit 26

United States of America ex rel. Ven-a-Care of the Florida Keys, Inc. v. Abbott Laboratories, Inc., et al.,
Civil Action No. 01-12257-PBS

Exhibit to the July 24, 2009, Declaration of George B. Henderson, II
In Support of United States' Common Memorandum of Law in Support of Cross-Motions for
Partial Summary Judgment and in Opposition to the Defendants' Motions for Summary
Judgment

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November 18, 2008

1

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UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

In re: PHARMACEUTICAL INDUSTRY AVERAGE
WHOLESALE PRICE LITIGATION

THIS DOCUMENT RELATES TO: MDL No. 1456
UNITED STATES OF AMERICA ex rel. Civil Action
VEN-A-CARE OF THE FLORIDA KEYS, No. 01-12257-
INC., v. DEY, INC., et al., Civil PBS
Action No. 05-11084-PBS; and UNITED
STATES OF AMERICA ex rel. VEN-A-CARE
OF THE FLORIDA KEYS, INC., v.
BOEHRINGER INGELHEIM CORP., et al.,
Civil Action No. 07-10248-PBS

(Cross-noticed captions on following pages.)

November 18, 2008

9:10 a.m.

Videotaped deposition of Thomson
PDR Inc., by KRISTEN MINNE

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2

1 IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI

2 FIRST JUDICIAL DISTRICT

3 - - - - - x

4 THE STATE OF MISSISSIPPI, :
5 Plaintiff, :
6 vs. : Civil Action No.
7 ABBOTT LABORATORIES, INC., : G2005-2021
8 et al., :
9 Defendants. :
10 - - - - - x
11
12 UNITED STATES DISTRICT COURT
13 FOR THE DISTRICT OF MASSACHUSETTS
14 - - - - - x
15 IN RE: PHARMACEUTICAL : MDL NO. 1456
16 INDUSTRY AVERAGE WHOLESALE : CIVIL ACTION
17 PRICE LITIGATION : 01-CV-12257-PBS
18 THIS DOCUMENT RELATES TO: : Hon. Patti B. Saris
19 The City of New York, et al. :
20 v. :
21 Abbott Laboratories, et al. :
22 - - - - - x

1 is that an accurate reflect of your testimony;
2 earlier?

3 **A. I --**

4 MR. GASTWIRTH: Objection to form.

5 **A. I honestly don't know there was**
6 **pricing. I'm assuming there was, but, yeah,**
7 **that's not what I was using the publication for.**

8 Q. And let me just sort of go
9 historically and clarify who exactly it was that
10 published the Red Book.

11 The Red Book is now a publication
12 that's published at least on a macro level by
13 Thomson Reuters; is that correct?

14 **A. Correct.**

15 Q. Is it published by a particular unit
16 within Thomson Reuters?

17 **A. The healthcare division.**

18 Q. And has Thomson Reuters always been
19 the entity that published the Red Book?

20 MR. CAHILL: Or a predecessor?

21 MR. GOBENA: Or a predecessor, yeah.

22 **A. Originally it was Medical Economics,**

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66

1 and at some point Thomson purchased Medical
2 Economics. I don't know when that was.

3 Q. And I've also seen an entity
4 identified as Micromedex as well.

5 What's Micromedex?

6 A. Micromedex is a company in Denver that
7 was started in the mid-'70s, and then Thomson at
8 some point in the '90s came in and bought
9 Micromedex.

10 Q. Do you know when Thomson purchased
11 Micromedex?

12 A. I believe it was the early '90s. I
13 know it was prior to my employment there.

14 Q. And do you know when Thomson acquired
15 Medical Economics?

16 A. I do not know.

17 Q. That predicated your employment as well?

18 A. Either predicated my employment or
19 predicated my understanding of the larger Thomson
20 corporation at that point.

21 Q. Do you know whether there is any kind
22 of relationship between Micromedex and Medical

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77

1 by the National Drug Code number. The Average
2 Wholesale Price (AWP), Direct Price (DP) and the
3 Orange Book code complete the entry for each
4 product."

5 Is that basically still the same type
6 information that's being published in the Red
7 Book?

8 MR. SWEENEY: Objection to the form.

9 **A. Yes, it is.**

10 Q. And I notice that there's -- it
11 mentions that AWP and DP, or direct price
12 information, are published. There's no mention
13 of publication of WAC information.

14 Do you know why that is?

15 **A. I do not.**

16 MR. CAHILL: And all these questions
17 are about the hard copy --

18 MR. GOBENA: Yeah.

19 MR. CAHILL: -- version of the Red
20 Book, just to clarify?

21 Q. Do you know whether -- whether WAC has
22 ever been published in the hard copy of the Red

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1 Book?

2 **A. To the best of my knowledge, no, it**
3 **has not.**

4 Q. Is WAC copied in any electronic
5 version of the Red Book?

6 **A. Yes, it is.**

7 Q. Let's go on to the text beneath that
8 graphic there on this page, and it reads, "All
9 prices are current as of the date Red Book went
10 to press. However, actual prices paid by
11 retailers may vary, and all prices are subject to
12 change without notice. The prices shown here are
13 based on data obtained from manufacturers,
14 distributors and other suppliers. While great
15 care has been exercised in compiling this
16 information, the publisher of Red Book does not
17 warrant its accuracy."

18 Is it consistent with your
19 understanding of what -- the source of
20 information for the prices published in Red Book,
21 that that information, pricing information, came
22 from either manufacturers, distributors or other

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84

1 whether it's consistent with your historical
2 understanding of Red Book's editorial practices.

3 First of all, do you by any chance know
4 who Mr. Steve Sorkenn of Red Book is?

5 **A. I do not.**

6 Q. So he was -- to the best of your
7 knowledge, he was no longer employed at Thomson
8 or Medical Economics from the beginning of your
9 tenure?

10 **A. Correct.**

11 Q. Well, there's a section of this
12 document I want to focus in on in particular. And
13 -- again, this is an internal HHS memo where
14 Elliot Hirshon from DHHS-OIG, OAS Region II, was
15 having a discussion with Mr. Sorkenn, and
16 memorialized that discussion.

17 I want to direct your attention to the
18 section that reads "Sources of Information." And
19 in particular we'll start with that first
20 paragraph.

21 Mr. Hirshon writes -- and, again, he's
22 memorializing his conversation with Mr. Sorkenn

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85

1 -- he says, "Mr. Sorkenn stated that the average
2 wholesale price, AWP, is based on data from
3 several sources. He explained that Red Book goes
4 through the same basic processes as its
5 competitors, MediSpan, First Data, Blue Book, to
6 develop the AWP as well as the published direct
7 price and suggested retail price."

8 The next sentence reads, "He indicated
9 that the primary source of information is the
10 manufacturer."

11 Is that sort of -- again, this is Mr.
12 Hirschon reflecting his conversation with Mr.
13 Sorkenn, but is that statement, that the primary
14 source of pricing information is the
15 manufacturer, consistent with your historical
16 knowledge as to where Red Book collected its
17 pricing data?

18 MR. GASTWIRTH: Objection to form.

19 **A. Yes, it is.**

20 Q. He says -- he goes on to say, "This
21 information is obtained either from surveys,
22 questionnaires, which Red Book sends to the

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86

1 manufacturers, or the manufacturers may
2 voluntarily send the information to Red Book."
3 And he goes on to say that "Mr. Sorkenn felt that
4 a blank copy of the questionnaire could not be
5 forwarded since it represents proprietary
6 information."

7 Are you aware of any questionnaires or
8 surveys that were sent to Red Book by
9 manufacturers to collect pricing information that
10 would ultimately be published in the Red Book?

11 MR. GASTWIRTH: Objection to form.

12 **A. My assumption is he's referring to
13 something we call a PLV, product listing
14 verification form.**

15 Q. Why don't you describe what that is.

16 **A. A PLV is a listing of what Red Book
17 currently has listed for a manufacturer;
18 products, package size, NDC, also pricing, and
19 it's a form that's sent to manufacturers on a
20 yearly basis, asking them to verify and confirm
21 that the product is still available and that that
22 price, with its effective date, is still**

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87

1 **accurate.**

2 Q. We'll go over some of those -- I think
3 the product listing verifications a little bit
4 later.

5 It says, "According to Mr. Sorkenn, Red
6 Book's questionnaires ask manufacturers to supply
7 AWP as well as DP."

8 Is that consistent with your historical
9 understanding of what kind of information would
10 be asked of manufacturers by Red Book?

11 MR. GASTWIRTH: Objection to form.

12 **A. Yes.**

13 MR. SWEENEY: Can you read back the
14 question, please.

15 (Record read)

16 Q. Mr. Hirschon goes on to say in this
17 memo, "While he" -- and he's referring to Mr.
18 Sorkenn -- "felt that most manufacturers are
19 cooperative and supply all the requested
20 information, Red Book can use alternative sources
21 to either develop or corroborate this
22 information."

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95

1 it's nine pages of product listings.

2 First, if you could tell me what
3 exactly -- we talked about this a little bit
4 earlier, but explain in detail, what exactly is a
5 product listing verification?

6 **A. A product listing verification is a**
7 **printout of all of the manufacturer's products**
8 **that the Red Book currently has in their**
9 **database.**

10 **Let me qualify that with saying it's a**
11 **listing of all the active products, meaning**
12 **products that we have listed that we believe are**
13 **still currently manufactured.**

14 Q. So who generates this printout that
15 we're looking at here?

16 **A. This is generated by the Red Book**
17 **staff.**

18 Q. And once they generate this printout,
19 what do they do with it?

20 **A. This printout is mailed once a year to**
21 **the manufacturer.**

22 Q. And are these product listing

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96

1 verification printouts, are they sent to every
2 manufacturer that has a drug listed in the Red
3 Book?

4 **A. Yes, they are.**

5 MS. LORENZO: Objection, form.

6 Q. And why are -- why is Red Book sending
7 out this product listing verification form to
8 these manufacturers?

9 MS. LORENZO: Objection, form.

10 **A. It is a process by which we attempt**
11 **to, first of all, verify that we have all the**
12 **correct products listed for that manufacturer,**
13 **and also to verify that the prices are still**
14 **accurate.**

15 Q. So when you're sending out these
16 tables or charts that are generated, you're
17 sending it out hoping that the manufacturers will
18 correct any errors, whether it's pricing or
19 listing of a product that's no longer active; is
20 that correct?

21 MR. GASTWIRTH: Objection to form.

22 **A. We hope that they will return it to us**

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106

1 **A. No.**

2 Q. Why was it not unusual?

3 **A. Umm --**

4 MR. GASTWIRTH: Objection to form.

5 **A. Many manufacturers do not provide**
6 **direct pricing.**

7 Q. That's what the DIRP stands for,
8 direct price?

9 **A. Correct. And they are not required**
10 **to.**

11 Q. At this time period, October 2000, did
12 Red Book have that electronic version of the
13 database that we were talking about earlier?

14 **A. Yes, they did.**

15 Q. Is it possible that the direct price
16 for this product would have been listed -- if
17 there was any -- in that electronic database?

18 MR. GASTWIRTH: Objection to form.

19 **A. If there was a direct price in the**
20 **electronic database, it should be on this list as**
21 **well.**

22 Q. So the hard copy of the price listing

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150

1 **effective date was -- was as the manufacturer**
2 **wanted us to list it as well.**

3 Q. So as to pricing, the accuracy was
4 completely dependent on the drug manufacturer;
5 correct?

6 MR. GASTWIRTH: Objection to form.

7 MR. SWEENEY: Objection to form.

8 **A. Yes.**

9 Q. Looking down toward the middle of the
10 document, there's a paragraph that begins with
11 the word "complete." And I'll read for the
12 benefit of the record -- are you with me?

13 **A. Yes, I am.**

14 Q. Okay, thank you.

15 "Complete and up-to-date WAC (wholesale
16 acquisition cost) pricing is also requested for
17 our electronic database."

18 Did I read that correctly?

19 **A. Yes, you did.**

20 Q. Is it true that over the years Red
21 Book has published WAC pricing in its electronic
22 database?

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151

1 **A. Yes, it has.**

2 Q. And that, again, was pricing that was
3 derived from manufacturers; correct?

4 **A. That was received --**

5 MR. GASTWIRTH: Objection to form.

6 **A. -- from manufacturers, correct.**

7 Q. And annually verified by drug
8 manufacturers; correct?

9 MR. GASTWIRTH: Objection to form.

10 **A. Correct.**

11 MR. ANDERSON: Ma'am, I appreciate your
12 answers, but if you could just hesitate a split
13 second because there are objections being lodged
14 and that way your answer's not drowned out by the
15 objection, okay.

16 THE WITNESS: Okay.

17 Q. Your last answer was yes; correct?

18 **A. My last answer was correct, yes.**

19 **Yes, you are correct, my last answer**
20 **was yes.**

21 MR. ANDERSON: All right. We could do
22 a Laurel and Hardy routine...

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158

1 noticed as the corporate representative?

2 MS. TORGERSON: Objection to form.

3 MR. SWEENEY: Object to the form.

4 Only for that time period what?

5 MR. ANDERSON: It's from 1990 to the
6 present.

7 **A. For the time period prior to 2002,
8 when I was not involved with the Red Book data.**

9 Q. I see. So prior to 2002 -- for the
10 time period prior to 2002 you are testifying on
11 behalf of Red Book; correct?

12 **A. Correct.**

13 Q. All right. And you do understand that
14 prior to 2002 drug manufacturers were reporting
15 AWP information to Red Book?

16 MS. TORGERSON: Objection.

17 MR. SWEENEY: Objection to form.

18 **A. That is my understanding.**

19 Q. And in turn that reported AWP
20 information was being published by Red Book?

21 MS. TORGERSON: Object to the form.

22 MR. SWEENEY: Object to the form.

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159

1 **A. Correct.**

2 Q. Now, there's been some mention today
3 of what's known as an AWP policy that was
4 implemented; is that correct?

5 **A. Correct.**

6 Q. And that policy was implemented
7 sometime around 2002?

8 MR. GASTWIRTH: Objection to form.

9 **A. Very early in 2003.**

10 Q. Very early -- okay.

11 Can you provide a brief description of
12 what the Red Book AWP policy is that was
13 instituted in early 2003?

14 **A. The policy states that in a case where
15 a manufacturer will not supply an AWP, that Red
16 Book will calculate an AWP using a percentage
17 markup from WAC or direct.**

18 Q. And how does Red Book ascertain that
19 percentage markup?

20 **A. The policy is just a -- it's the same
21 for every manufacturer. So every manufacturer
22 who will not supply it will -- their prices will**

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160

1 **be calculated using the same formula.**

2 Q. Did Red Book experience manufacturers
3 choosing to not publish an AWP, or refuse to
4 publish an AWP in the early 2000s?

5 MS. TORGERSON: Objection to form.

6 **A. Yes.**

7 Q. And was that a relatively new
8 experience in Red Book's business practices?

9 MR. SWEENEY: Objection to form.

10 **A. Yes.**

11 Q. Do you have any understanding as the
12 Red Book corporate representative as to why some
13 drug manufacturers were refusing to publish AWP?

14 MS. TORGERSON: Objection, form.

15 MR. SWEENEY: Objection, foundation.

16 **A. I do not know why they would not
17 supply AWP.**

18 Q. Did Red Book communicate to drug
19 manufacturers the standard markup that Red Book
20 would utilize to publish an AWP when drug
21 companies refused to report AWP?

22 MR. CAHILL: Under the new policy?

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1 **product.**

2 Q. All right. And then there's a second
3 bullet that reads, "Manufacturer supplies
4 wholesale acquisition cost (WAC) or direct price
5 (DP)."

6 Did I read that correctly?

7 **A. Yes, you did.**

8 Q. And then there's a subbullet that
9 reads, "Manufacturer supplies an AWP markup
10 formula."

11 Did I read that correctly?

12 **A. Yes, you did.**

13 Q. Can you describe generally what that
14 concept is?

15 **A. That concept refers to when the
16 manufacturer would supply us with a WAC or a DP
17 price and verbally would tell us to create a WP,
18 add this merge.**

19 Q. So as opposed to providing the exact
20 numerical figure for the AWP, instead the
21 manufacturer would provide guidance on how the
22 AWP would be calculated?